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alternative means to serve mass market customers. Those few carriers that could economically justify the deployment of a switch to serve mass market customers in particular locations – or to acquire another service provider with an existing switch – began to do so. Carriers without the financial means to self-provide switching, or the customer line density necessary for self-provided switching to be economically viable, stopped actively marketing their services to mass market customers. By June 2006, the most recent date for which the Commission has made data available, ILECs were providing 22% fewer UNE loops with switching (*i.e.*, the type of service arrangement represented by Qwest's QPP/QLSP products) than six months earlier.<sup>143</sup> Resold lines also are declining.<sup>144</sup> Overall, wireline competitive carriers are exiting the mass market. From June 2005 to June 2006, the number of residential lines served by CLECs declined by approximately 4 million (from 16.33 million to 12.37 million) and from December 2004 to June 2006 the decline was even more precipitous. During that 18-month period, CLEC residential lines dropped 7.4 million (from 19.81 million to 12.37 million).<sup>145</sup>

Qwest, notwithstanding the fact that it carries the burden of proof, has provided no evidence that these nationwide numbers – and the alarming trend they represent – are not applicable to the specific markets for which it is requesting forbearance.<sup>146</sup> If these numbers

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<sup>143</sup> *Local Telephone Competition: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 4 (Jan. 2007) (“*June 2006 Local Competition Report*”).

<sup>144</sup> *Id.*

<sup>145</sup> *June 2006 Local Competition Report*, Table 2.

<sup>146</sup> The only data relevant to this issue offered by Qwest is the number of voice grade equivalent (“VGE”) residential lines, as of December 2006, competitors were serving throughout the MSA using Qwest’s QPP/QLSP products and the number of VGE residential lines, as of the same date, competitors were serving throughout the MSA using Qwest’s Section 251(c)(4) resold services. *See, e.g.*, Qwest Petition – Denver, at 16-17, Highly Confidential Exhibit 2. This data, which is more than six months old (and is not sufficiently granular), does not permit any conclusions regarding trends.

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truly are representative of the state of affairs within the four MSAs at issue here, and we maintain they are, Qwest's request for forbearance on the basis of the wholesale alternatives it has made available to wireline carriers serving the mass market must be denied.

In its comments, the Washington Utilities and Transportation Commission identified one aspect of Qwest's QPP/QLSP agreements "that raises doubt about the effectiveness of these agreements as commercial replacements for existing wholesale services."<sup>147</sup> The UTC stated that it recently reviewed 12 Qwest commercial agreements and found that a common element of each agreement, Section 4.6, contains a "troubling provision" that excuses poor wholesale performance by Qwest from the Washington State Qwest Performance Assurance Plan ("QPAP"), "which is the only remaining incentive in place to ensure reasonable and adequate wholesale service quality."<sup>148</sup>

Further, the recent experience of McLeodUSA in the Omaha MSA illustrates that the Commission should not take on faith Qwest's representations that its already unappealing wholesale alternatives will remain available to wireline competitors should forbearance be granted. McLeodUSA's Petition for Modification of the *Omaha Forbearance Order* requests that the Commission reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission's "'predictive judgment' that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c) has proven incorrect."<sup>149</sup> McLeodUSA's repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest have

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<sup>147</sup> UTC Comments, at 14-15.

<sup>148</sup> *Id.*, at 15.

<sup>149</sup> See *McLeodUSA Petition*, at 1.

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been colossally unsuccessful, and “Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers.”<sup>150</sup>

Qwest’s refusal to negotiate wholesale rates following the *Omaha Forbearance Order* not only defies the Commission’s predictive judgment regarding Qwest’s behavior once Section 251(c)(3) forbearance was granted, but it also violates Qwest’s obligation under Section 271(c)(2)(B) to provide unbundled access to local loops and transport at just and reasonable rates.<sup>151</sup> The Commission should not presume that Qwest would behave any differently in the Denver, Minneapolis/St. Paul, Phoenix or Seattle MSAs than it has in Omaha should it be successful in gaining Section 251(c)(3) forbearance in those four markets.

### b. Enterprise Market

Qwest contends that forbearance from Section 251(c)(3) unbundling requirements is appropriate in the enterprise market because competitors in the four MSAs at issue are using Qwest’s special access services to serve enterprise customers.<sup>152</sup> Qwest cites the *Omaha Forbearance Order* for the proposition that enterprise competition which relies on Qwest’s special access services supports the conclusion that Section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of its last-mile and interoffice transport offerings are just and reasonable and not unreasonably discriminatory.<sup>153</sup> Once again, Qwest misconstrues the *Omaha Forbearance Order*. There, the Commission took notice of the fact that “a number of carriers have had success competing for enterprise services using DS1 and DS3

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<sup>150</sup> *Id.*, at 4.

<sup>151</sup> *Id.*, at 10.

<sup>152</sup> *See, e.g.*, Qwest Petition – Denver, at 24 (“As in Omaha, competitors in the Denver MSA are competing extensively using Special Access obtained from Qwest.”).

<sup>153</sup> *Id.*, at 23 (citing *Omaha Forbearance Order*, at ¶ 68).

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special access channel terminations obtained from Qwest”<sup>154</sup> and found that special access-based competition “supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary”<sup>155</sup> but, importantly, the Commission did not base its decision to grant Qwest limited Section 251(c)(3) forbearance on the existence of special access-based competition.<sup>156</sup>

There are several important reasons why the Commission should not take into account special access-based competition here. First, the paltry data Qwest offers regarding enterprise competition using special access is not geographic market-specific.<sup>157</sup> Second, Qwest has produced no evidence that any carrier relying on its special access service is competing successfully in the local exchange market in any area. As pointed out by the Commission in the *Triennial Review Order*, “a carrier’s use of tariffed incumbent LEC offerings does not conclusively demonstrate that it is doing so successfully, or should continue to do so.”<sup>158</sup>

Third, there is significant record evidence in the Commission’s *Special Access Reform Proceeding*<sup>159</sup> and elsewhere that Phase I and Phase II incumbent LEC pricing flexibility for special access services has resulted in higher special access prices and that reform of special

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<sup>154</sup> *Omaha Forbearance Order*, at ¶ 68.

<sup>155</sup> *Id.*

<sup>156</sup> Moreover, in the *Anchorage Forbearance Order*, GCI’s reliance on ACS’s wholesale services, including its special access circuits, compelled the Commission to order ACS to continue to provide access to its loop facilities throughout the Anchorage study area, including in wire centers where forbearance from section 251(c)(3) unbundling was granted. *See Anchorage Forbearance Order*, ¶ 38 (“we find that a continuing obligation of ACS to provide access to loops and subloops at commercially reasonable rates is necessary to justify the relief we grant ACS today . . .”).

<sup>157</sup> *See* Qwest Petition – Denver, at 23-24; Qwest Petition- Minneapolis-St. Paul, at 24-25; Qwest Petition – Phoenix, at 24-25; Qwest Petition, - Seattle, at 24.

<sup>158</sup> *Triennial Review Order*, at ¶ 64.

<sup>159</sup> *See, e.g.,* Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, WC Docket No. 05-25, RM-10593 (filed Aug. 8, 2007) (“*XO et al. Special Access Comments*”).

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access pricing rules is in order.<sup>160</sup> The Commenters recently compiled and analyzed a sampling of ILEC rates – including rates for Qwest in Arizona and Colorado – which demonstrated that the rates for special access channel terminations and mileage today are, with rare exception, significantly higher than for comparable UNE rates, indicating that special access rates are excessively above cost and are therefore unjust and unreasonable.<sup>161</sup> The Commenters’ analysis showed, for example, that the price cap month-to-month recurring rate for DS1 loops/channel terminations is 67% higher than the corresponding DS1 UNE rate in Arizona.<sup>162</sup> Similarly, the price cap one-year term commitment DS1 channel termination rate is 62% higher than the corresponding DS1 UNE rate in Arizona.<sup>163</sup> Moreover, Qwest’s special access non-recurring charges (“NRCs”) in Arizona and Colorado are 75% to 85% higher than the UNE NRCs in those states and apply even when a customer commits to a three-year term.<sup>164</sup> Therefore, absent meaningful special access reform, it cannot be concluded that Qwest’s pricing behavior would lead to just and reasonable rates for necessary local network facilities if Section 251(c)(3) forbearance is granted.<sup>165</sup>

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<sup>160</sup> See *UTC Comments*, at 11 (“Contrary to the expectations set forth in the Commission’s Pricing Flexibility Order, it appears that pricing flexibility has allowed incumbent LECs to raise prices in those areas where competition is ostensibly most vigorous.”).

<sup>161</sup> See *XO et al. Special Access Comments*, at 16-20, Attachment 2.

<sup>162</sup> *Id.*, at Attachment 2.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> A group of seven CLECs filed joint comments with the Minnesota Public Utilities Commission (“MN PUC”) last week in a MN PUC proceeding regarding Qwest’s forbearance petition for the Minneapolis-St. Paul MSA in which they provided evidence that Qwest’s special access rates are dramatically higher than its UNE rates in the Minneapolis-St. Paul MSA. Comments of the CLEC Coalition, MPUC Docket No. P421/CI-07-661 (filed Aug. 17, 2007) (“*CLEC Coalition Comments*”), at 12-14. According to the CLEC Coalition, “the highest current UNE DS1 loop rate in the Twin Cities MSA is \$36.54 (zone 3). Under Qwest’s current interstate special access tariff for Minnesota, CLECs would pay \$132.25 for the same facility, a 262% increase. Even with

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Finally, while it makes no reference in its Petitions to alternative wholesale sources of supply for carriers serving the enterprise market, the Brigham/Teitzel Declaration accompanying Qwest's Petitions mentions that "wholesale services are now offered by several carriers as an alternative to Qwest's wholesale services."<sup>166</sup> In support of this statement, Qwest provides a list of companies, including AT&T, Eschelon, Granite Telecommunications, McLeodUSA, Trinsic, and Verizon, that have "all self-reported to the FCC that they are offering 'carrier's carrier' services to other telecommunications providers."<sup>167</sup> Qwest produces absolutely no evidence that any of these carriers is in fact offering commercially-viable alternative wholesale last-mile facilities and services any wire center in any of the four MSAs at issue. Instead, Qwest includes selected promotional statements and press releases pulled from company websites for a few of these carriers.<sup>168</sup> These unsupported statements are hardly probative of the nature and extent (if any) of wholesale alternatives to Qwest's special access service for carriers serving the enterprise market in those four MSAs. Consequently, this "evidence" should be ignored by the Commission.

The lack of wholesale alternatives to Qwest's special access services has been documented in recent comments to the Minnesota Public Utilities Commission. The Minnesota Commission has initiated a proceeding to inquire into Qwest's petition seeking forbearance in

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the largest discount available in Qwest's special access tariff – the Regional Commitment Plan ('RCP') – the \$36.54 price would increase by 182% to \$103.15." *Id.*, at 12-13 (footnote omitted).

<sup>166</sup> See *Brigham/Teitzel Declaration - Denver*, at ¶ 50. See also *Brigham/Teitzel Declaration - Minneapolis/St. Paul*, at ¶ 54; *Brigham/Teitzel Declaration - Phoenix*, at ¶ 47; *Brigham/Teitzel Declaration - Seattle*, at ¶ 52.

<sup>167</sup> *Brigham/Teitzel Declaration - Denver*, at ¶ 50.

<sup>168</sup> See, e.g., *Brigham/Teitzel Declaration - Denver*, at ¶¶ 51-56.

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the Minneapolis-St. Paul MSA.<sup>169</sup> In response to the Minnesota Commission's request for comment on Qwest's forbearance request, a coalition of seven CLECs ("CLEC Coalition") provided evidence that there are no significant alternatives to Qwest's last-mile facilities and limited alternatives to Qwest's interoffice transport facilities in the Minneapolis-St. Paul MSA.<sup>170</sup> The CLEC Coalition submitted affidavits/declarations of Eschelon, Integra, McLeodUSA, Popp.com, TDSM, and XO detailing the extent to which competitive carriers depend on access to Qwest's last-mile network and its interoffice transport facilities to reach their customers.<sup>171</sup> The CLEC Coalition concluded that "continued enforcement of Section 251(c)(3) obligations remains necessary because Qwest holds a monopoly throughout the Twin Cities MSA in the wholesale market for the network facilities carriers need to provide competitive telecommunications services."<sup>172</sup>

### V. QWEST HAS NOT SHOWN IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS

In addition to its request for forbearance from Section 251(c)(3) unbundling obligations, Qwest requests relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules, and the Commission's Computer III rules, including CEI and ONA requirements.<sup>173</sup> Again, Qwest has failed to demonstrate that continued enforcement of these requirements is not

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<sup>169</sup> *Minnesota Public Utilities Inquiry Regarding the Petition for Qwest Corporation, Filed with the Federal Communications Commission, for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area*, Docket No. P-421/CI-07-661, Minnesota Public Utilities Commission.

<sup>170</sup> *CLEC Coalition Comments*, at 5-10.

<sup>171</sup> *Id.*, at Exhibits 1-8.

<sup>172</sup> *Id.*, at 5.

<sup>173</sup> *See* n. 3, *supra*.

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necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement is not necessary for the protection of consumers. As noted by the Washington Utilities and Transportation Commission, “[e]liminating the obligation to comply with Part 61 [dominant carrier tariff] regulations would result in a lack of controls over the pricing of interstate special access services on which Qwest’s competitors in the Seattle MSA rely. Further, it would mean that Qwest could deaverage or assess higher special access prices to its wholesale competitors compared to those charged to end users.”<sup>174</sup>

As noted by the Commission in the *Omaha Forbearance Order*, forbearance from dominant carrier regulation is justified only if the state of competition is such that the interests of consumers and competition would be protected in the absence of the regulations at issue.<sup>175</sup> In the Omaha forbearance proceeding, the Commission noted that dominant carrier regulations initially were imposed on ILECs, including Qwest, as a result of a Commission determination that those carriers “have market power in the provision of most services within their service area.”<sup>176</sup> Consequently, forbearance from dominant carrier regulation must be preceded by a finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it seeks forbearance.<sup>177</sup>

Market share; supply and demand elasticities; and the firm’s cost, structure, size, and resources are all relevant to the Commission’s analysis of whether the ILEC seeking

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<sup>174</sup> *UTC Comments*, at 10.

<sup>175</sup> *Omaha Forbearance Order*, at ¶ 19.

<sup>176</sup> *Id.*, at ¶ 11. The Commission defines market power as the “‘ability to raise prices by restricting output’ or ‘to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.’” *Id.*, at n. 54.

<sup>177</sup> *Id.*, at ¶ 22.

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freedom from dominant carrier regulation retains market power.<sup>178</sup> In granting Qwest forbearance from certain dominant carrier regulations with respect to its mass market exchange access services and its mass market broadband Internet access services in the *Omaha Forbearance Order*, the Commission found that each of these economic factors justified forbearance.<sup>179</sup>

Here, Qwest has failed to provide any data to evaluate these factors. Indeed, Qwest fails to address these factors at all in its Petitions. In the absence of any market-specific information that may be used to evaluate Qwest's market share, as well as the other economic factors relevant to an analysis of whether dominant carrier regulation is necessary to protect consumers and competition, the Commission should conclude that Qwest has failed to meet its burden of proof and Qwest's request for forbearance from dominant carrier rules should be denied.

Similarly, Qwest has failed to meet its burden of proof that forbearance from the Computer III requirements is justified. The only mention Qwest makes of Computer III in its Petitions is in the introductory footnote where Qwest identifies with specificity the statutory and regulatory provisions from which it seeks forbearance.<sup>180</sup> Qwest makes absolutely no effort whatsoever to explain how or why forbearance from Computer III requirements would be consistent with the public interest or how or why enforcement of those requirements is not necessary either to ensure that Qwest's rates, terms and conditions of service are just, reasonable

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<sup>178</sup> *Id.*, at ¶ 31.

<sup>179</sup> *Id.*, at ¶¶ 39-43.

<sup>180</sup> *See, e.g.*, Qwest Petition – Denver, at 3.

and nondiscriminatory or to protect consumers. Denial of Qwest's request for forbearance from the Commission's Computer III rules therefore must follow.

**VI. SECTION 271 IS NOT A SUFFICIENT BACKSTOP TO DEVELOP AND PRESERVE COMPETITION IF FORBEARANCE IS GRANTED**

Although the Commission in the *Omaha Forbearance Order* partially granted Qwest's request for forbearance from the obligations of Section 251(c)(3), the Commission did so only while declining to forbear from similar requirements under the competitive checklist contained in section 271(c)(2)(B)(iv) through (vi) of the Act.<sup>181</sup> The Commission reiterated that "checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 . . ."<sup>182</sup> and that "Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory . . ."<sup>183</sup> Indeed, the Commission's willingness to grant Qwest partial Section 251(c)(3) forbearance was grounded significantly on the ongoing applicability of Section 271's network element requirements.<sup>184</sup>

Similarly, the Commission's decision to grant ACS partial forbearance from its Section 251(c)(3) unbundling obligations in Anchorage was conditioned on the continued availability of loop access.<sup>185</sup> Noting that because ACS is not a BOC, and therefore is not

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<sup>181</sup> *Omaha Forbearance Order*, at ¶ 100.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*, at ¶ 64 ("We also rely on the continued operation of other provisions of the Act designed to develop and preserve competitive local markets, including particularly the other obligations arising under sections 251(c) and 271(c) that apply to Qwest from which we do not forbear today."). *See also id.*, at ¶ 62.

<sup>185</sup> *Anchorage Forbearance Order*, at ¶¶ 39-40.

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subject to the requirements of Section 271, the Commission conditioned its grant of forbearance on an obligation that “mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval . . .”<sup>186</sup> Specifically, the Commission compelled ACS to continue to provide legacy loop access at just and reasonable and not unreasonably discriminatory rates upon expiration of the one year transition period adopted by the Commission.<sup>187</sup> The Commission imposed this condition as a “prerequisite to [its] grant of forbearance,” concluding that “absent this condition . . . [it] would not be able to conclude that the criteria of section 10 are met.”<sup>188</sup>

The evidence is quite clear, however, that Section 271(c)’s competitive checklist obligations cannot be relied on to discipline Qwest’s behavior. As discussed in Section IV.A.2, *supra*, Qwest’s post-forbearance market behavior in the Omaha MSA clearly shows that the obligations contained in Section 271 cannot be relied upon to ensure just and reasonable charges and practices. As a threshold matter, it is unclear whether Qwest even has made any Section 271 offering available in the Omaha MSA. According to McLeodUSA, despite repeated attempts, Qwest has failed to provide a proposed Section 271 pricing list.<sup>189</sup> McLeodUSA has surmised that by Qwest’s silence, it continues to maintain that its special access offerings, in particular, its tariffed Regional Commitment Plan (“RCP”), satisfies its Section 271 obligation.<sup>190</sup> If Qwest does, in fact, contend that its special access services meet its Section 271 obligation to make

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<sup>186</sup> *Id.*, at ¶ 41.

<sup>187</sup> The Commission mandated use of the rates for DS0 and DS1 loops currently in effect in Fairbanks, Alaska until such time as alternative rates are agreed to by ACS and GCI. *Id.*, at ¶ 39.

<sup>188</sup> *Id.*, at ¶ 40.

<sup>189</sup> *McLeodUSA Petition*, at 8.

<sup>190</sup> *Id.*

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unbundled loops and transport available at just and reasonable rates, the Commission has no choice but to conclude that Qwest is not in compliance with Section 271, since the evidence is incontrovertible that Qwest's special access rates far exceed just and reasonable levels.<sup>191</sup>

Qwest's actions in Omaha are consistent with its general position – and the position of the other Regional Bell Operating Companies ("RBOCs") – that the market should be relied upon to set rates and terms for Section 271 network elements and the process should be free from oversight or approval by regulators. The legal questions surrounding whether state and/or federal regulators have the authority to set rates and terms for Section 271 checklist elements, or whether these matters will be left to the market, is currently being litigated in multiple jurisdictions with varying results.<sup>192</sup> The RBOCs – including Qwest – are taking

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<sup>191</sup> See Section IV.B.5.b, *supra*.

<sup>192</sup> See, e.g., *Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), *Qwest Corp. v. Ariz. Corp. Comm'n*, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 2068103 (D. Ariz.) (July 17, 2007) (granting Qwest's request for declaratory and injunctive relief); *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Application 05-07-024, Decision Adopting Amendment to Existing Interconnection Agreements, 2006 Cal. PUC LEXIS 33 (Cal. P.U.C. Jan. 26, 2006); *Qwest Corp. v. Pub. Util. Comm'n of Colorado*, 2006 WL 771223 (D. Colo. 2006), *aff'd*, 479 F.3d 1184 (10<sup>th</sup> Cir. 2007); *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447, Order, 2005 Mich. PUC LEXIS (Mich. P.S.C. Sep. 20, 2005), *appeal pending*, *Michigan Bell Tel. Co., d/b/a AT&T Michigan v. Covad Communications Company et al.*, No. 2:06-CV-11982 (E.D. Mich.) (filed Apr. 28, 2006); *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket No. P-421/CI-05-1996, Notice and Order for Hearing, 2006 PUC LEXIS 48 (Minn. P.U.C. May 4, 2006); *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions)*; *Petition for Declaratory Order re Line Sharing*, Docket Nos. DT 03-201 and 04-176 (consol.), Order No. 24,442, Order Following Brief, 2005 N.H. PUC LEXIS 24 (N.H. P.U.C. Mar. 11, 2005), *rev'd in part*, *Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB (D. N.H. 2006), *appeal pending*, *Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 06-2429 (1st Cir.) (filed Sep. 21, 2006). See also, e.g., *BellSouth Emergency Petition for the Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed Jun.

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advantage of the current unsettled environment by refusing to honor their statutory obligation to make Section 271 checklist elements available at just and reasonable, and not unreasonably discriminatory, rates and terms. Consequently, until the law becomes settled, the bare existence of an ongoing obligation under Section 271 to make loops and transport available cannot be relied upon to police Qwest's behavior and to ensure that competitors are afforded competitively-viable access to the facilities they need to provide service to consumers.

The RBOCs' position that the commercial negotiation process should be relied upon to set Section 271 rates and terms would not be so problematic if the commercial negotiation process could be relied upon to result in rates and terms for Section 271(c) checklist items that further Congress' and the Commission's goal "to develop and preserve competitive

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24, 2004); *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 18, 2006); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, *Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271*, 2006 Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and *Order Setting Rates Under Section 271*, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006), *appeal pending*, *BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm'n et al.*, No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm'n*, No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24, 2006); *XO Illinois Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, As Amended*, Docket No. 04-0371, *Amendatory Arbitration Decision 66-67* (Ill. C. C. Oct. 8, 2004), *granted in part and denied in part*, *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05 C 1149, 2007 WL 2796488 (N.D. Ill. Sept. 28, 2006); *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), *Order*, 2006 Ky. PUC LEXIS 680 (Ky. P.S.C. Aug. 16, 2006), *appeal pending*, *BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm'n et al.*, 3:06-CV-00065-KKC (E.D. Ky.) (filed Sep. 12, 2006); *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, *Order Part II* (Me. P.U.C. Sep. 3, 2004), *aff'd*, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), *appeal pending*, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir.) (filed Jul. 19, 2006).

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local markets.”<sup>193</sup> But that is not the case. Qwest’s response to carriers that must replace Qwest’s Section 251(c)(3) loop and transport elements in wire centers and on routes that have been de-listed is not to enter into an arms-length, good faith negotiation process. Instead, Qwest merely provides competitors with a “take-it-or-leave-it” choice among its special access offerings. Regretfully, Qwest’s special access offerings fall far short of the mark.

In light of Qwest’s marketplace behavior in the Omaha MSA and more generally, in order to justify forbearance from Section 251(c)(3) unbundling requirements, it is not enough for the Commission to passively note Qwest’s ongoing statutory obligations under Section 271(c)(2)(B). The Commission must find that Qwest has produced evidence that it is consistently meeting its Section 271(c)(2)(B) obligations (and is acting consistently with the requirements of Section 10(a)) through the offering of rates and terms for loops and transport that are just and reasonable and not unreasonably discriminatory. Qwest cannot sustain its burden that its treatment of special access meets its obligations under items 4 and 5 of the Section 271(c)(2)(B) competitive checklist and would provide a sufficient backstop to protect consumers and competition if Section 251(c)(3) unbundling of loops and transport were to be granted by the Commission. Consequently, Qwest’s requested Section 251(c)(3) forbearance relief should be denied.

### **VII. A GRANT OF FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST**

Beyond Qwest’s failure to demonstrate that ongoing Section 251(c)(3) unbundling and dominant carrier regulations are not necessary to ensure that its charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers, as discussed above, it is clear that the Qwest Petitions are not consistent with the public interest,

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<sup>193</sup> *Omaha Forbearance Order*, at ¶ 64.

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and therefore do not satisfy the third prong of the Section 10(a) test. There are several reasons compelling the conclusion that the grant of forbearance to Qwest in the four MSAs at issue would run counter to the public interest. And it is not an exaggeration to suggest that granting forbearance would have significant deleterious public interest impacts that would extend far beyond the four MSAs under consideration here.

### A. Competition Would Be Diminished If Forbearance Is Granted

In the *Omaha Forbearance Order*, the Commission analyzed the third prong of the Section 10(a) test (*i.e.*, whether forbearance from the unbundling obligations of Section 251(c)(3) would be in the public interest) largely on the basis of the actual competition which existed within the Omaha MSA. The Commission noted that the factors upon which it based its conclusions regarding satisfaction of the first two prongs of the Section 10(a) standard “also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under Section 10(a)(3).”<sup>194</sup> The principal factor guiding the Commission in the Omaha case, of course, was evidence of sufficient facilities-based competition. Likewise, in the *Anchorage Forbearance Order*, the Commission based its grant of forbearance on the fact that “ACS is subject to a significant amount of competition in the Anchorage study area.”<sup>195</sup>

As discussed above, Qwest has not demonstrated sufficient competition from cable companies, wireless service providers, O/VoIP providers, alternate transport providers, or other sources in any of the subject MSAs. Accordingly, not only has Qwest failed to meet the

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<sup>194</sup> *Omaha Forbearance Order*, at ¶ 75.

<sup>195</sup> *Anchorage Forbearance Order*, at ¶ 49.

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first two prongs of the Section 10(a) standard, it has failed to satisfy the public interest standard under Section 10(a)(3).

In the *Omaha Forbearance Order*, the Commission also found that the costs of continued Section 251(c)(3) unbundling outweighed the benefits;<sup>196</sup> something which Qwest claims is true generally in each of the four MSAs that are the subject of its current Petitions.<sup>197</sup> The Commission concluded that the “costs [of unbundling] are unwarranted and do not serve the public interest once local exchange and access markets are sufficiently competitive, as is the case in certain limited areas of the Omaha MSA.”<sup>198</sup> Here, because Qwest has failed to demonstrate, in any of the four metropolitan areas that are the subject of its Petitions, sufficient competition in any relevant geographic market, the Commission has no basis to conclude, even “in certain limited areas of the [subject] MSA[s],” that the costs of unbundling outweigh the benefits.

More particularly, Qwest offers no evidence in its Petitions that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout the four MSAs.<sup>199</sup> Indeed, the evidence is compelling that competitive conditions in these MSAs are such that

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<sup>196</sup> *Omaha Forbearance Order*, at ¶¶ 76-77.

<sup>197</sup> See Qwest Petition – Denver, at 28; Qwest Petition- Minneapolis-St. Paul, at 28; Qwest Petition – Phoenix, at 29; Qwest Petition, - Seattle, at 28.

<sup>198</sup> *Omaha Forbearance Order* at ¶ 77.

<sup>199</sup> Qwest claims that the unbundling requirements in the subject MSAs are “excessive.” See, e.g., Qwest Petition - Denver, at 28. Because Qwest has failed to meet its burden to demonstrate sufficient competition in any of the four MSAs, it has no foundation for this assertion. As a result of this failure, any assertion that its unbundling obligations are “excessive” reduces to the untenable assertion that *any* of its unbundling obligations are excessive, a conclusion which is totally at odds “with Congress’s clear intent in Section 10 to sunset *in a narrowly tailored fashion* any regulatory requirements that are no longer necessary in the public interest so long as consumer interests and competition are protected.” See *Omaha Forbearance Order*, at ¶ 40 (emphasis supplied).

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continued unbundling is required because market forces alone cannot be relied upon to sustain competition.

Qwest relies in part on the competition provided by “wireline CLECs” to support its requested relief in both the mass market and the enterprise market.<sup>200</sup> Yet these competitors in the Qwest incumbent local operating territory – including the Commenters – continue to rely overwhelmingly on Qwest-provided unbundled loop and transport UNEs to serve their hundreds of thousands of customers located throughout the Qwest footprint. As discussed in detail herein, these service providers have no practical alternatives to use of Qwest’s wholesale network facilities, particularly Qwest’s last mile capabilities, to reach consumers. If the current regulatory obligation on Qwest to make these wholesale inputs available to competitors on cost-based (*i.e.*, TELRIC) rates and terms were to disappear through forbearance, it is difficult to see how consumers and competition would benefit. Indeed, the result would almost certainly be the opposite; competitors would be forced to purchase loops and transport facilities at substantially higher rates, driving some out of the market entirely and forcing the remaining carriers to raise rates and limit service options – particularly harmful outcome for residential and small business users.

Qwest also contends that “[e]liminating unbundling regulation will ‘further the public interest by increasing regulatory parity’ between telecommunications providers” in the subject MSAs.<sup>201</sup> Qwest argues that because it is losing customers to intermodal competitors, it would be in the public interest to end allegedly unequal regulation between the different

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<sup>200</sup> See Qwest Petition – Denver, at 9-10, 22-24; Qwest Petition- Minneapolis-St. Paul, at 9-10, 23-25; Qwest Petition – Phoenix, at 9-10, 23-25; Qwest Petition, - Seattle, at 9-10, 22-24.

<sup>201</sup> See, *e.g.*, Qwest Petition – Denver, at 29 (*quoting Omaha Forbearance Order*, at ¶ 78).

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technological modes of delivery. In the *Omaha Forbearance Order*, however, the Commission made clear that the impetus to create technological parity is warranted only “[o]nce the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities.”<sup>202</sup> As shown herein, there is not yet sufficient actual competition from wireless, cable, O/VoIP, or other service providers in any of the four MSAs that are the subject of Qwest’s Petitions. Steps taken to establish technological parity cannot precede the emergence of sufficient competition but, instead, must effectively derive from it. Given the state of the market in the four MSAs at issue and Qwest’s failure to meet its burden of proof, establishing regulatory parity at this time in any of the four MSAs would be unwarranted, premature, and certainly *not* in the public interest.<sup>203</sup>

In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>204</sup> A finding that forbearance will promote competition could form the basis for a conclusion that forbearance is in the public interest. At the same time, however, a mere finding that forbearance would not be detrimental to the public is not enough. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance.

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<sup>202</sup> *Omaha Forbearance Order*, at ¶ 78.

<sup>203</sup> Notably, Qwest fails to make the argument, relied upon by the Commission in the *Omaha Forbearance Order*, that forbearance would motivate Qwest to compete vigorously on both a retail and a wholesale basis. See *Omaha Forbearance Order*, at ¶¶ 79-81.

<sup>204</sup> 47 U.S.C. § 160 (b).

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Qwest has failed to establish such benefits *would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.*

**B. Consumers Would Be Harmed If Forbearance Is Granted**

Section 10(a)(3) compels the Commission to give great weight to the interests of *consumers* in the MSAs at issue. Careful consideration of the current state of competition in the four MSAs at issue leads inexorably to the conclusion that consumers in Denver, Minneapolis-St. Paul, Phoenix, and Seattle would suffer significant harm should forbearance be granted.

As discussed above, competitive carriers continue to rely on Qwest's loops and transport facilities to reach their customers. Continued access to Qwest's loops and transport under Section 251(c)(3) at TELRIC rates is critically important to carriers serving either the mass market or the enterprise market within the four MSAs at issue. Unfortunately, widespread wholesale alternatives to use of Qwest's facilities and services do not presently exist, nor are they on the horizon, and complete self-supply generally is not practically or economically feasible. The ability to use Qwest's network at cost-based rates remains absolutely essential to ensure that consumers of competitive carriers continue to enjoy the value-added competitive services they currently enjoy today and to take advantage of the competitive innovations of tomorrow.

For example, Covad Communications purchases DS0 UNE loops from Qwest and uses them in conjunction with its own next-generation ADSL2+ facilities to offer a Line Powered Voice ("LPV") product which provides residential customers value-added bundles of local and long distance voice and high-speed Internet access with speeds of up to 25 mbps for a single monthly fee. EarthLink currently uses LPV to make its "DSL & Home Phone" service

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available in 11 major cities, including the Seattle MSA.<sup>205</sup> Covad expects to make similar LPV service offerings available to other wholesale partners for residential and/or business use and directly to its own business customers in the future.<sup>206</sup> Similarly, XO uses DS0 loops in association with Ethernet over copper technologies deployed in XO's network to enable the provision of broadband services at multi-megabit per second speeds not thought possible only a few years ago. In addition, technologies available today can support numerous simultaneous streams of high-definition video, becoming a formidable competitive alternative to the hybrid fiber-coax ("HFC") plant of cable providers and the FTTH/FTTC/fiber-to-the-node plant of the incumbent LECs. Absent DS0 UNE loops, competitors' ability to provide these innovative competitive service offerings could be significantly curtailed.

Because competitive carriers remain reliant on access to Qwest's loop and transport UNEs, the grant to Qwest of forbearance from UNE unbundling obligations (including TELRIC pricing) would force competitive carriers to raise prices, narrow their service offerings, and curtail the introduction of innovative products and services. Thus, millions of consumers in the four MSAs at issue soon would be faced with fewer carrier and service choices and, perhaps most importantly, higher prices.

This concern caused the Washington Utilities and Transportation Commission to register its opposition to the forbearance requested by Qwest in the Seattle MSA. In its comments, the Washington Commission stated it "has grave concerns regarding the scope of

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<sup>205</sup> EarthLink's DSL & Home Phone service offers residential consumers three bundles of voice and DSL services with differing voice usage amounts, premium calling features, and broadband speeds at \$49.95 to \$69.95 per month. *See* <http://www.earthlink.net/voice/bundles/dslhomephone/>.

<sup>206</sup> *See* Covad Completes Build-Out of Nation's Largest Next Generation Telecommunications Network Ahead of Schedule (Dec. 27, 2006) *available at* [http://www.covad.com/companyinfo/pressroom/pr\\_2006/12\\_27\\_06.pdf](http://www.covad.com/companyinfo/pressroom/pr_2006/12_27_06.pdf).

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Qwest's Seattle Petition and the adverse effects it will have on competition if granted in whole."<sup>207</sup> The Washington Commission noted its statutory authority to regulate telecommunications companies in the public interest and indicated that although it has "actively responded to efforts by [ILECs], particularly Qwest, to reduce, streamline or eliminate state regulation where conditions warrant," the "vast scope" of the relief Qwest is seeking, "if granted, would undercut the very foundation and delicate balance of the UTC's past decisions."<sup>208</sup> In the expert opinion of the Washington Commission, "forbearance from Section 251(c)(3) throughout the Seattle MSA [would be] contrary to the public interest."<sup>209</sup>

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<sup>207</sup> *UTC Comments*, at 2.

<sup>208</sup> *Id.*, at 2-3.

<sup>209</sup> *Id.*, at 5.

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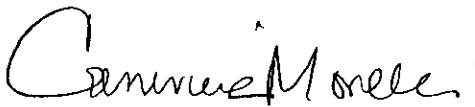
**VIII. CONCLUSION**

For all of the forgoing reasons, Qwest's Petitions should be dismissed. If the Commission declines to dismiss the Petitions, it must deny Qwest the regulatory relief it seeks on the ground that Qwest has not met the statutory prerequisites for forbearance contained in Section 10 of the Act.

Respectfully submitted,

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